MISCELLANY.

PAYING FOR CORPORATE SHARES IN PROPERTY.—The decision of Judge Jenkins, sitting in the Circuit Court of the United States for the Seventh Circuit, *Taylor* v. *Walker* (May 3, 1902), printed in this issue, will call renewed attention to the question to what extent shares of stock shall be paid up in the hands of the corporators, when property is given in exchange for them. In the case under consideration the court has dealt with facts showing that the capital of the company had not been paid up in the amount of several hundred thousand dollars. It would seem that the case of *Coit* v. *Gold Amalgamating Co.*, 119 U. S. 343, affirming s. c. 14 Fed. 12, has controlled the decisions of the Federal courts, although those of the highest court of the State, sitting in the same jurisdiction, tend in the other direction.

These decisions cover two theories upon this subject, which have been called by the learned commentator, Judge Thompson, "the true value theory" and the "good faith theory." Under the former theory shares of stock issued by a corporation to its stockholders in exchange for property of less value than the par value of the stock are chargeable by the corporation creditors with the difference between the value of the property taken and the par value of the stock, regardless of the question of actual fraud, and under this theory the motive of the co-adventurers is not considered, but the law annexes the conclusion of fraud where property or services are received in payment of the shares at a clearly inadequate valuation. This holding is based upon the reasoning that the issue of shares of a corporation for a wholly inadequate consideration is as much a fraud upon its creditors as though the corporation had disposed of any other debt due it for a wholly inadequate consideration, and that such a fraudulent holder of stock is liable to creditors for its par value, less what he has paid for it to the corporation.

The other theory is denounced by Judge Thompson as "destructive" of the rights of creditors, and proceeds upon the idea that whatever the co-adventurers in good faith agree to be the true value of the property received for the shares is in fact such valuation.

The case decided by Judge Jenkins shows the difference between the two theories in most glaring colors, and if this decision is to stand as the law of this circuit, then the "good faith theory" has been pushed to extreme limits, severely destructive of the rights of creditors.

We only call attention to this case in this brief way in order that the subject matter may again come before the forum of professional opinion, and promise to return to the subject, because it is of the highest consequence to the commercial community. The rule of the State of Illinois is now voiced in the holding in *Sprague* v. *National Bank of America*, which insists that subscribers to capital stock of a corporation must pay for it, not in good faith, but the full value, just as if they had paid the hard cash. This is undoubtedly the sounder rule. It seems now that a result has been reached, foreshadowed in *Flash* v. *Conn.*, 109 U. S. 371, wherein Mr. Justice Woods, speaking of another phase of the question, said: "It is clear that confusion and uncertainty would result should the

State and Federal courts place different constructions on the section (New York Statutes). Such a result ought, if possible, to be avoided."—*National Corporation Reporter.*

DOUBLE PUNISHMENT UNDER STATUTE AND ORDINANCE. — Where a municipal ordinance prohibits acts which are also penal offences under the State laws, questions of considerable difficulty arise. That such ordinances may constitutionally be passed is generally, though not universally, admitted. Cooley, Const. Lim., 6th ed., 239; *cf.* 1 Beach, Pub. Corp., sec. 510. Accepting their constitutionality, may the same act be twice punished, once under the ordinance, and again under the statute? Some States hold that it may not; and that the act is punishable alone by that power which first takes jurisdiction. *Lynch* v. *Commonwealth*, 35 S. W. Rep. 264 (Ky.); see *People* v. *Hanrahan*, 75 Mich. 611. A recent Missouri case, inconsistent with earlier decisions in the same court, gives a contrary answer. *State* v. *Muir*, 65 S. W. Rep. 285; *contra*, *State* v. *Cowan*, 29 Mo. 330. The defendant having been convicted and fined in the police court upon a complaint for violating a city ordinance against gambling, was indicted under a statute for the same act, and his plea of *autrefois convict* held no bar. The prosecution under the ordinance was considered a merely civil proceeding.

This result, though not this reasoning, is in accord with the weight of authority. Cooley, *supra*; *Hankins* v. People, 106 Ill. 628; *State* v. *Clifford*, 45 La. Ann. 980. It is usually argued that the single act constitutes two offences, one purely local, against the police regulations of the municipality, the other a violation of the public law. *Mayor* v. *Allaire*, 14 Ala. 400. An analogy is often drawn to the concurrent jurisdictions of State and Federal courts. See *State* v. *Ambrose*, 6 Ind. 351. This analogy however is unsound, for the municipality is not a distinct sovereign, its only power emanating solely from the State. A more satisfactory reason for allowing such double punishment is advanced when it is said that the constitutional prohibitions against double jeopardy were never intended to apply to conviction under a mere police regulation. *State* v. *Clifford*, *supra*. This view would seem to find support in those cases which permit conviction for a violation of the ordinance by summary proceedings, when, if the act were punished as a violation of the statute, indictment and jury trial would be requisite. *Ogden* v. *Madison*, 87 N. W. Rep. 563 (Wis.); *McInery* v. *Denver*, 17 Col. 302.

The principal case suggests a third ground on which to support these decisions, namely that the prosecution under the ordinance is not really a criminal proceeding. Such a view is not wholly without support. Where, as at common law, the enforcement of the ordinance is by an action of debt for the fine brought in the name of the city, the action is admittedly civil. 1 Dill., Mun. Corp., sec. 410. But where, as is usual in this country, the proceeding is in the nature of a complaint, the character of the action is much disputed. The cases necessarily turn largely upon the particular wording of the State constitution and statutes. See 33 L. R. A. 33, note. In general it seems to be held that if the violation of the ordinance is also a misdemeanor by statute or common law, the proceeding is criminal; otherwise it is civil. See *State* v. *Municipal Court of Milwaukee*, 89 Wis. 358. This distinction appears invalid. The character of the violation of

the police regulations of the city is not altered by the criminality or non-criminality of the act under the statutes. The true test, it is thought, rests in the intention of the legislature in authorizing, and of the city in passing, such regulations. This is to be gathered from the nature of the act prohibited, the penalty imposed, and the method of procedure. If the purpose of the ordinance is to render reparation to the city by a fine, the proceeding, even though by complaint, may well be considered civil rather than criminal. On the other hand, if the object is to penalize the offender, it would seem that the proceeding to collect the fine, unless it be an action of debt, and certainly the proceedings to impose a penalty of imprisonment, would be of a criminal character. The statement of the principal case, therefore, that such proceedings are merely civil would seem too broad; yet two convictions may be supported in such cases on the ground above suggested that the constitutional protection against double jeopardy was not intended to extend to punishment for violation of a city ordinance.—*Harvard Law Review.*

LIABILITY OF MUNICIPAL CORPORATIONS—MASTER AND SERVANT.—The many and often conflicting decisions, defining and limiting the liabilities of municipalities for torts, have dealt with but one side of this subject, namely, the liability to members of the public. The other side—the liability to employees for injuries for which an individual or a private corporation would be answerable in civil actions, has been presented by two recent cases. *Peterson* v. *Wilmington* (N. C. 1902), 40 S. E. 853, and *Caldwell* v. *Waterbury* (Conn. 1902), 51 Atl. 530. The first held a city was not liable for injuries sustained by a fireman from the collapse of a defective reel, while the latter was even a stronger case, holding a municipality was not liable for injuries from defective machinery to an employee working upon material to be used in the construction of a street. As these decisions were based entirely upon the authority of cases exempting municipalities from liability for torts to members of the public, a short discussion of the principles involved in such cases is necessary to a thorough understanding of the result in the principal cases.

It is such a well-settled principle in the law of municipal corporations that a municipality is not liable for torts committed *ultra vires*—Dillon's Municipal Corporations, Ch. XXIII.—that this discussion will be confined to torts committed by acts within the corporate power. This aspect of the question is involved in the greatest confusion. The better view—though by no means a universal one—recognizes a distinction between the liability of municipalities for acts of a governmental and legislative character, and for those of a private nature, and exempts the municipalities from liability in the first instance, while holding them to a strict liability in the latter. *Scott* v. *Mayor of Manchester* (1857), 2 H. & N. 204; Dillon's Municipal Corporations, sec. 948. The great difficulty, and the one occasioning all the confusion upon this subject, has been the application of this distinction. Each court has adopted its individual ideas of what is a governmental function and what a private one, until it has become almost impossible to lay down any rule of practical value for the determination of this question. The chaotic condition of this branch of the law is well represented by the statement of Mr. Justice Foote in *Lloyd* v. *Mayor* (1851), 5 N. Y. 369, 375, that "All that can be done with safety is to determine each case as it

arises." But some order has been brought out of chaos by the opinion of Chief Justice Gray in the leading case of *Hill* v. *Boston* (1877), 122 Mass. 344. After an outline of the growth of the law of municipal corporations in both England and this country, the learned justice recognized the distinction between governmental and private functions and referred to the case of *Bailey* v. *Mayor*, etc. (N. Y. 1842), 3 Hill, 531, 539, as embodying the correct principle for its application. In this last case, Chief Justice Nelson said: "To this end, regard should be had not so much to the nature and character of the various powers, as to the object and purpose of the legislature in conferring them. If granted for a public purpose exclusively, they belong to the corporate body in its public, political or municipal character. But if the grant was for purposes of private advantage and emolument, though the public may derive a benefit therefrom, the corporation *quoad hoc* is to be regarded as a private company." Applying this to the principal cases, it is clear the maintenance of fire departments and the construction of streets are governmental functions, and had the injuries been sustained by members of the public, there could have been no recovery in these actions.

But a further question arises, does the reason which exempts municipalities from liability for torts, committed in the exercise of governmental functions, where the suits are by members of the public, apply with equal force to actions by employees? Many reasons have been assigned for this exemption from suits by the public, but the better view is that it is an arbitrary exemption based upon public policy. Though no legislative body can delegate to another branch of the government the power to enact laws, this principle does not prevent conferring powers of local regulation upon local authorities. Cooley's Constitutional Limitations, pp. 137, 138. In a measure, then, a city in the exercise of governmental or political functions is performing the duties of a State, and it is a fundamental principle of government that a State cannot be sued without its consent. "This is a privilege of sovereignty," said Chief Justice Waite in *Railroad Co.* v. *Tennessee* (1871), 101 U. S. 337, 339. The privilege is granted since, all the acts of a State being for the benefit of the public, it would be against public policy for the State to be liable for a failure to perform these acts, or for the manner in which they are performed. Any other view would bankrupt the State and render impossible the performance of the ordinary functions of a State. This exemption from suit applies with equal force whether the performance of these duties be vested in the State or conferred upon the city by the State. This, then, being the reason for the exemption of the city from suit in the discharge of governmental or legislative duties, it is immaterial whether the suit be by a member of the public or by an employee. There can be no liability in either case. As has been said above, there is but little authority upon the liability of municipal corporations to employees—though that little, as represented by the recent case of *Hughes* v. *County of Munroe* (1895), 147 N. Y. 49, is in accord with the views expressed above. Here the question was squarely decided—and the county was exempted from liability in an action brought by an employee for injuries from defective machinery—though again the decision was based entirely upon the authority of cases deciding *only* that members of the public could not hold public corporations, like cities and counties, liable for torts committed in the discharge of governmental duties. It is safe to say, therefore, that wherever these cases arise the courts will be justified in deciding upon the authority of cases involving suits by members of the public, that municipal corporations are not liable to employees for torts committed in the performance of governmental and legislative duties.—*Columbia Law Review.*